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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 994

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

OSSIE McCRAY.

STATEMENT OF JURISDICTION AS REQUIRED BY PARAGRAPH 1 OF RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

Jurisdiction.

The Acts of Congress, February 13, 1925, 43 Stat. 937; U. S. Comp. Stat. Sec. 1214 gives appellant the right of appeal direct to the Supreme Court of the United States from the judgment of the highest court of a State where the constitutionality of a State statute is drawn in question as being repugnant to the Constitution of the United States and the decision of the State court is in favor of its validity.

The Supreme Court of Arkansas is the highest court in that State and the judgment sought to be appealed from is final.

Date of Decree.

The date of the final judgment in the Supreme Court of Arkansas is March 20, 1933, and the application for appeal was presented on April 12, 1933.

Statement.

This is a suit on an insurance policy for Five Hundred (500) Dollars, and the judgment in the Supreme Court of Arkansas was for Seven Hundred Ninety and 45/100 (790.45) Dollars, which included an item of Sixty (60) Dollars, being 12% of the amount of the policy, and Two Hundred (200) Dollars attorney's fees assessed by the lower court and affirmed by the Supreme Court under Section 6155 of Crawford and Moses' Digest of Arkansas copied in full on page 4 of the petition for appeal heretofore filed, the other items being for interest and court costs.

The policy was upon the life of one Jonas McCray, who committed suicide on May 10, 1932.

The policy contained the following provision:

> "If within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon."

The policy was dated November 3, 1930, and lapsed for non-payment of premium on May 1, 1931, and was reinstated on August 1, 1931, the said death being

within one year from the date of reinstatement.

The question presented on its merits in the court below was whether the one year suicide clause began to run from the date of the policy, November 3, 1930, or from the date of the reinstatement, or August 1, 1931.

The petitioner, Life & Casualty Insurance Company of Tennessee, is a Tennessee corporation, and at its September Term, 1905, the Supreme Court of Tennessee in the case of *Insurance Company* v. *Galbraith*, 115 Tenn. 471, held that where a policy lapsed and was reinstated it became a new contract, and its date thereafter should be considered as the date of the reinstatement and that all of the terms and provisions of the policy began to run anew from the date of the reinstatement. This case is referred to and copied from at some length on pages 2 and 3 of the petition for appeal to which reference is here made.

The petitioner being a Tennessee corporation, and this policy being issued after the above decision, this interpretation of the words in the policy became a part of the policy to the same extent as if actually written therein and, therefore, the suicide having occurred within one year from the date of the reinstatement, the said policy imposed no liability upon your petitioner. Accordingly, your petitioner denied liability and this suit resulted.

It is clear that after the decision of the Galbraith case above, no Tennessee policy holder would be entitled to be paid anything under a policy where it had lapsed and been reinstated and suicide had occurred

within one year from the date of the reinstatement, and if your petitioner had permitted an Arkansas policy holder to recover, under these circumstances, it would have amounted to giving the Arkansas policy holder greater benefits under the policy than were enjoyed by the Tennessee policy holders. Your petitioner was expressly forbidden to do this by Section 6132 of the Tennessee Code of 1932, providing:

> "No life insurance company doing business in Tennessee shall make or permit any distinction or discrimination between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates to be charged for policies of life or endowment insurance or in the dividends or other benefits paid thereon or in any other of the terms and conditions of the contracts it makes; * * *"

The Supreme Court of Arkansas prior to the time that this suit had been instituted, in the cases of *New York Life Insurance Company* v. *Adams*, 155 Ark. 123; *Security Life Insurance Company* v. *Leeper*, 171 Ark. 77, and *Equitable Life* v. *King*, 178 Ark. 293, had held that an insurance company in reinstating a policy could not insert any new provisions not contained in the policy itself. None of these cases discussed or decided the proposition here involved, that is, whether under the original policy where the Supreme Court of the State under which the Company was organized had given a definite construction to the words used therein, the lapse and reinstatement of the policy constituted a new contract and a new date from which all of the provisions of the policy began to run anew. The

Supreme Court of Arkansas differed with the Supreme Court of Tennessee and held that where a policy was reinstated, its provisions ran from the original date of the policy and not from the date of the reinstatement, and, accordingly, that the death of McCray within one year from the date of the reinstatement but more than one year from the date of the policy constituted no defense.

We are not now presenting the question as to whether the Supreme Court of Tennessee was right or whether the Supreme Court of Arkansas was wrong, but merely to show that this suit presented a *bona fide* substantial controversy and that your petitioner had the right to refuse to pay this policy and to defend it in good faith.

In rendering judgment against your petitioner and in construing this policy directly opposite from the Supreme Court of Tennessee, the Supreme Court of Arkansas assessed a penalty of 12 per cent of the amount of the policy, to-wit, sixty (60) dollars, and two hundred (200) dollars attorney's fees under Section 6155 of Crawford & Moses' Digest of Arkansas, which is as follows:

> "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees

> to be taxed by the Court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law, collected."

The construction placed by the Supreme Court of Arkansas upon this statute was that it imposed these penalties upon your petitioner without reference to whether or not it acted in good faith in refusing to pay and in defending the suit. Your petitioner contended before the Supreme Court of Arkansas and now contends that this statute thus construed violates the Constitution of the United States in two particulars: (1) it violates Article 1, Section 10, forbidding the passage of any law "impairing the obligations of contracts"; and (2) the Fourteenth Amendment forbidding any State to "deprive any person of life, liberty or property, without due process of law".

As applied to Article 1, Section 10, your petitioner contends that requiring it to pay the sum of two hundred sixty (260) dollars in addition to the amount of five hundred (500) dollars imposed by the contract, is impairing the obligation of the contract, and that placing a penalty upon your petitioner merely because a judgment might be rendered against them is denying your petitioner of the right to resort to courts in a defense of a claim to which it believes it has an honest defense. The very essence of the Fourteenth Amendment is the right in good faith to take any controversy to courts because it is only in courts and by courts that due process may be had.

This entire matter was discussed by this Court in the case of *Supreme Ruling of the Mystic Circle* v. *Snyder*, 227 U. S. 497, 57 L. Ed. 611, where the court considered the constitutionality of the Tennessee penalty statute and in which the court said:

> "The act does not make the mere refusal to pay sufficient evidence of bad faith, so as to justify the added recovery; it requires that the bad faith be shown, and that the consequent additional loss be shown. And the State Court so construed the statute in the application that was made of it in the present case."

It thus appears that this case involves the constitutionality of said Section 6155 of Crawford & Moses' Digest of Arkansas in that petitioner contends that the section violates the constitution of the United States in two particulars: (1) Article 1, Section 10, forbidding the impairment of contracts; and (2) the Fourteenth Amendment forbidding the taking of property without due process of law; and that the Supreme Court of Arkansas held the statute valid against these contentions. Therefore, this application for appeal comes directly within the Act of Congress, February 13, 1925, 43 Stat. 937, U. S. Comp. Stat. Sec. 1214, giving the petitioner the right of direct appeal to the Supreme Court of the United States from the judgment of the highest court of the State where the constitutionality of a State statute is drawn in question as being repugnant to the Constitution of the United States and the decision of the State court is in favor of its validity.

We further wish to emphasize as worthy of special consideration the fact that Arkansas is situated in the eighth circuit and that the decisions of that court and the United States Circuit Court of Appeals is in direct conflict as shown by the following language taken from the opinion of the Supreme Court of Arkansas in the present case:

> "• • • assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statute. *Security Ins. Co.* v. *Smith*, 183 Ark. 254, 35 S. W. (2d) 581; *Mut. Life Ins. Co.* v. *Marsh*, 185 Ark. 332, 47 S. W. (2d) 585, *where we expressly refused to follow the Circuit Court of Appeals in Standard Acc. Ins. Co.* v. *Rossi*, 35 Fed. (2d) 667, and *Inter-Southern Life Ins. Co.* v. *McElroy*, 38 Fed. (2d) 557. This question is now settled and we decline to reconsider the matter."

This quotation shows that the Supreme Court of Arkansas construes the decisions of the United States Circuit Court of Appeals for the Eighth Circuit as holding the statute in controversy here unconstitutional in the above cases, and this presents a direct conflict between these high Courts within the same territorial jurisdiction.

This shows that the subject-matter of this appeal is not frivolous but one of material and substantial merit, presenting the constitutionality of the above statute as above set forth. It further shows that in view of this direct conflict existing on this question between the Supreme Court of Arkansas and the United States Court of Appeals for the Eighth Cir-

cuit, your petitioner and other insurance companies are entitled to have this Court settle the matter.

Authorities Sustaining Jurisdiction.

Acts of Congress, February 13, 1925; 43 Stat. 937; U. S. Comp. Stat. Sec. 1214, giving the right of appeal direct to the Supreme Court of the United States from the judgment of the highest Court of a State where the constitutionality of a State statute is drawn in question as being repugnant to the Constitution of the United States and the decision of the State Court is in favor of its validity.

Supreme Ruling of *Mystic Circle* v. *Snyder*, 227 U. S. 497, holding the Tennessee insurance penalty statute constitutional on the ground that it did not merely give the penalty for an unsuccessful defense, but where the defense was made in bad faith.

Standard Life Ins. Co. v. *Rossi*, 35 F. (2) 667, and *Inter-Southern Life Insurance Company* v. *McElroy*, 38 F. (2) 557, holding Section 6155 of Crawford & Moses' Digest of Arkansas unconstitutional if applied to cases not showing bad faith.

Fourteenth Amendment of the Federal Constitution, forbidding the taking of property without due process of law, which means that every litigant has the constitutional right to litigate any question so long as he acts in good faith.

Galbraith v. *Insurance Company*, 115 Tenn. 471, holding that where a policy lapses and is reinstated, the date of the policy is then considered as of the date of the reinstatement and all of its provisions

begin to run anew. See also *Ins. Co.* v. *Spencer*, 62 F. (2) 650.

This statement relating to jurisdiction is prepared under a telegram from Hon. Charles Elmore Cropley, Clerk of this Court, advising that the Court wishes a statement of jurisdiction furnished as required by paragraph 1 of Rule 12 of this Court.

Respectfully submitted,

P. M. Estes,
Attorney for Life & Casualty Insurance Company of Tennessee.